

1
2
3
4
5
6
7 IN THE UNITED STATES DISTRICT COURT
8
9 FOR THE DISTRICT OF OREGON

10 JUANITA M. HERRERA,

Civil No. 06-6322-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 Richard F. McGinty
16 McGinty & Belcher, Attorneys
P.O. Box 12806
17 Salem, Oregon 97301
18 Attorney for plaintiff

19 Karin Immergut
United States Attorney
District of Oregon
20 Neil Evans
Assistant United States Attorney
1000 S.W. Third Avenue
21 Portland, Oregon 97204-2902

22 Leisa A. Wolf
Special Assistant U.S. Attorney
Social Security Administration
23 701 Fifth Avenue, Suite 2900 M/S 901
Seattle, Washington 98104-7075
24 Attorneys for defendant

25 AIKEN, Judge:

26 Claimant, Juanita M. Herrera, brings this action pursuant
27 to the Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1383(c)(3), to obtain judicial review of a final decision of the Commissioner denying her application for disability insurance benefits under Title II of the Act and for Supplemental Security Income (SSI) disability benefits under Title XVI of the Act. For the reasons set forth below, the Commissioner's decision is affirmed and this case is dismissed.

~~PROCEDURAL BACKGROUND~~

Plaintiff protectively filed her application for SSI benefits on September 18, 2002. Tr. 501. In October 2002, plaintiff applied for disability benefits, reporting that she had been disabled since December 1, 2001. Tr. 106-09. Plaintiff's application was denied initially and on reconsideration. On January 25, 2005, plaintiff appeared with counsel for a hearing before an Administrative Law Judge (ALJ). Tr. 512-15. The ALJ determined that the record was not fully developed so he sent plaintiff for psychological testing and evaluation. Tr. 514. On August 12, 2005, plaintiff appeared for a second time before the ALJ for a hearing. Tr. 516-34. Psychologist John Nance, Ph.D, testified at this hearing. Tr. 521-32. The ALJ, however, again determined that further testing was required and sent plaintiff for a second time for further psychological testing. Tr. 533. On February 16, 2006, the plaintiff appeared for a third time before the ALJ for a hearing, however, the ALJ stated that plaintiff's participation in the hearing was "too much of a struggle" and again continued the hearing. Tr. 541. Plaintiff presented for a fourth hearing on June 8, 2006. Tr. 543-63.

On July 21, 2006, the ALJ issued a decision in which he held that plaintiff was not disabled. Tr. 11-19. On November

30, 2006, the Appeals Council denied plaintiff's request for review, tr. 6-8, making the ALJ's decision the final agency decision. See 20 C.F.R. §§ 416.1481, 422.210.

STATEMENT OF THE FACTS

Plaintiff was 44 years old on her alleged onset date of December 1, 2001, and 50 years old on the date of the ALJ's decision. Tr. 50. Plaintiff obtained a four year college degree, but had no past relevant work experience. Tr. 17, 128. The vocational expert (VE) testified that plaintiff's past work was as an institutional cook, wall covering sales person, secretary, carnival food service worker, and care giver. Tr. 554.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by

1 reason of any medically determinable physical or mental
2 impairment which can be expected . . . to last for a continuous
3 period of not less than 12 months. . . ." 42 U.S.C.
4 § 423(d)(1)(A).

5 The Secretary has established a five-step sequential
6 process for determining whether a person is disabled. Bowen v.
7 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
8 416.920. First the Secretary determines whether a claimant is
9 engaged in "substantial gainful activity." If so, the claimant
10 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.
11 §§ 404.1520(b), 416.920(b).

12 In step two the Secretary determines whether the claimant
13 has a "medically severe impairment or combination of
14 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
15 §§ 404.1520(c), 416.920(c). If not, the claimant is not
16 disabled.

17 In step three the Secretary determines whether the
18 impairment meets or equals "one of a number of listed impairments
19 that the Secretary acknowledges are so severe as to preclude
20 substantial gainful activity." Id.; see 20 C.F.R.
21 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
22 presumed disabled; if not, the Secretary proceeds to step four.
23 Yuckert, 482 U.S. at 141.

24 In step four the Secretary determines whether the claimant
25 can still perform "past relevant work." 20 C.F.R.
26 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
27 disabled. If she cannot perform past relevant work, the burden
28 shifts to the Secretary. In step five, the Secretary must

1 establish that the claimant can perform other work. Yuckert, 482
2 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
3 (f). If the Secretary meets this burden and proves that the
4 claimant is able to perform other work which exists in the
5 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
6 416.966.

7 **DISCUSSION**

8 At step one of the five step sequential evaluation process
9 outlined above, the ALJ found that plaintiff had not engaged in
10 substantial gainful activity during the time period considered.
11 Tr. 18, Finding 1. This finding is not in dispute. At step two,
12 the ALJ found that plaintiff had the following severe
13 impairments: mild depression, anxiety, hiatal hernia, Sjogren's
14 syndrome, Raynaud's phenomenon, and asthma. Tr. 16, 18, Finding
15 2. This finding is not in dispute. At step three, the ALJ found
16 that plaintiff's impairments did not meet or equal the
17 requirements of a listed impairment. Tr. 16, 18, Finding 4.
18 This finding is not in dispute.

19 The ALJ determined that plaintiff had the residual
20 functional capacity (RFC) to perform light work with only
21 occasional contact with the public, occasional cooperative tasks
22 with co-workers, and limited to simple and repetitive work.
23 Further, the ALJ found plaintiff should avoid dusts, fumes,
24 odors, gases, and smoke. Tr. 17-18, Finding 5.

25 At step four, the ALJ found that plaintiff was precluded
26 from returning to her past relevant work. Id. Finally, at step
27 five, the ALJ found that, based on plaintiff's RFC, she could
28 perform work existing in significant numbers in the national

1 economy; specifically a small products assembler, electronics
2 worker, and office helper. Tr. 18, Finding 6. This finding is
3 in dispute.

4 1. Plaintiff's Credibility

5 The ALJ determined that plaintiff's statements concerning
6 her limitations were not entirely credible based upon the
7 assessment of the "examining physician" and "other reasons" the
8 ALJ alleged could be found in his decision. Tr. 18, Finding 4.
9 Plaintiff argues that first, the record does not contain the
10 opinion or record of an examining physician who evaluated or
11 assessed plaintiff for pain; and second, the "treating physician"
12 may not determine disability. 20 C.F.R. §§ 404.1527(e)(1),
13 416.927(e)(1). Plaintiff admits, however, that the record shows
14 that her pain complaints have been relatively stable, although
15 plaintiff argues that she had "good days and bad days with two to
16 three very bad days per week." Tr. 550.

17 Here, the ALJ found that reliable evidence does not support
18 plaintiff's allegations that she is incapable of working. When
19 a claimant has medically documented severe impairments that could
20 reasonably be expected to produce some degree of the symptoms
21 complained of, "the ALJ may reject [her] testimony regarding the
22 severity of symptoms only if he makes specific findings stating
23 clear and convincing reasons for doing so." Smolen v. Chater, 80
24 F.3d 1273, 1281-82 (9th Cir. 1996) (internal quotation omitted).
25 Further, if the "ALJ's credibility finding is supported by
26 substantial evidence in the record, we may not engage in second-
27 guessing." Thomas v. Barnhart, 278 F.3d 947 (9th Cir. 2002). As
28 long as the evidence reasonably supports the ALJ's findings, it

1 does not matter that the ALJ failed to explicitly link his
2 findings to the evidence. Lewis v. Apfel, 236 F.3d 503, 512-14
3 (9th Cir. 2001).

4 The ALJ provided the following reasons to support his
5 credibility analysis that plaintiff was only partially credible.
6 Tr. 17. Regarding plaintiff's physical complaints, the ALJ noted
7 the medical records continuously documented that she was doing
8 better. Id. Although plaintiff reported debilitating pain and
9 fatigue, the ALJ noted that no treating physician opined that she
10 was disabled, but rather, noted that she was doing well. Id.
11 Regarding plaintiff's mental limitations, objective psychological
12 testing revealed poor effort by plaintiff and only moderate
13 limitations. Id. The ALJ further noted malingering and secondary
14 gain incentive for exaggeration of symptoms. Id. Specifically,
15 the ALJ relied on the reports of two separate examining
16 physicians each suspecting plaintiff of malingering. First, in
17 October 2002, Leslie Pitchford, Ph.D., noted that psychological
18 testing produced an invalid personality assessment profile as
19 plaintiff failed to respond to 25 items despite being clearly
20 instructed to complete all items. Tr. 14, 214-18. Subsequent
21 testing performed by Dr. Pitchford in March 2005 revealed obvious
22 attempts at exaggeration and malingering. Tr. 15, 406-10.
23 Specifically, Dr. Pitchford noted that plaintiff was very passive
24 during the examination, and that she had dramatic behavior with
25 frequent sighing and very lengthy response latencies. Id. In
conclusion, plaintiff's efforts on testing were suspect and
produced an invalid profile given her endorsement of a very high
number of unusual items. Tr. 406-10. Due to her poor effort,

1 plaintiff was again referred for psychological testing. Tr. 15.
2 So on October 1, 2005, plaintiff was examined by Robert Kruger,
3 Psy.D. Tr. 464-65. While Dr. Kruger's report indicated that
4 plaintiff put forth better effort in this round of testing,
5 nevertheless, the validity indicators indicated that plaintiff
6 continued to engage in malingering and exaggerated behaviors.
7 Tr. 469. Overall, Dr. Kruger concluded that plaintiff's test
8 results raised a strong suspicion of malingering. Tr. 469-70.
9 I find that the ALJ judged plaintiff's credibility based on a
10 fair consideration of the entire case record and provided clear
11 and convincing reasons supported by substantial evidence for his
12 finding that plaintiff was only partially credible.

13 2. Improper Evaluation of the Evidence

14 Plaintiff next asserts that the ALJ erred by improperly
15 evaluating the evidence, "including providing legally
16 insufficient reasons for rejecting the opinion of treating
17 physician, Charles S. May, M.D." Tr. 459-61. Dr. May opined
18 that his "clinical impression" was that plaintiff had Sjogren's
19 syndrome, despite the fact that plaintiff "does not have
20 objective findings consistent with Sjogren's." Tr. 461. Dr. May
21 also opined that plaintiff had "some global achiness and easy
22 fatigability," but did not have any "crippling or loss of joint
23 function," and that she had more "constitutional symptoms." Id.
24 The ALJ further noted that Dr. May "was not impressed that she
25 has rheumatoid arthritis," and found that plaintiff's lab test
26 results were "fairly benign." Tr. 269, 339. The ALJ also relied
27 on the treatment records of Dr. Rexin, a psychiatrist, who noted
28 plaintiff had no psychiatric hospitalizations, no history of

1 suicide attempts, no hallucinations or delusions, had an
2 appropriate affect, average intelligence, and intact memory and
3 judgment. Dr. Rexin assessed a GAF score of 60, indicating only
4 moderate symptoms and/or limitations. Tr. 224-29.

5 Based on the ALJ's evaluation of plaintiff's medical
6 history and records, the ALJ concluded that plaintiff had severe
7 impairments that were not disabling at step three. The ALJ was
8 then required to assess plaintiff's RFC before proceeding to step
9 four. Plaintiff's RFC is defined as the most she can do given
10 her impairments and limitations. SSR 96-8p. In assessing
11 plaintiff's RFC, the ALJ must consider the entire record and
12 explain how he or she weighs the medical evidence and testimony.
13 SSR96-5p.

14 Plaintiff argues that the ALJ's RFC does not include
15 functional limitations for all of plaintiff's severe impairments
16 based on the records and findings of plaintiff's treating and
17 examining doctors. I disagree. The ALJ's RFC finding and
18 vocational hypothetical question properly accounted for all of
19 plaintiff's physical and mental limitations that the ALJ found
20 credible and were supported by the record. Specifically, the
21 ALJ's RFC and vocational hypothetical accurately included and
22 accounted for plaintiff's physical and mental limitations. The
23 ALJ properly considered the whole record and adequately explained
24 how he weighed the medical evidence and testimony. See SSR 96-
25 8p. I find the ALJ's decision free of legal error and
26 substantially supported by the evidence in the record.

27 ///

28 ///

CONCLUSION

The Commissioner's decision is based on substantial evidence, and is therefore, affirmed. This case is dismissed.

IT IS SO ORDERED.

Dated this 25 day of October 2007.

/s/ Ann Aiken

Ann Aiken

United States District Judge